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No. 93-1271

In the Supreme Court of the United States

OCTOBER TERM, 1993

WESLEY R. HAMMONS, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether there was substantial evidence to support the Railroad Retirement Board's finding that petitioner was not entitled to a disability annuity under the Railroad Retirement Act, 45 U.S.C. 231a(a)(1)(v).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a8) is unpublished, but the decision is noted at 7 F.3d 1045 (Table). The decisions of the Railroad Retirement Board (Pet. App. b1) and the Hearings Officer (Pet. App. b2-b14) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1993. On December 28, 1993, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 4, 1994. The petition for a writ of certiorari was filed on February 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 45 U.S.C. 231a provides:

(a) Individuals eligible for annuities; disability standards; proof of continued disability

(1) The following-described individuals, if they shall have completed ten years of service and shall have filed application for annuities, shall, subject to the conditions set forth in subsections (e), (f), and (h) of this section, be entitled to annuities in the amounts provided under section 231b of this title.

* * * * *

(v) individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

* * * * *

2. 20 C.F.R. 220.100 provides in relevant part:

Evaluation of disability for any regular employment.

(a) *General.* The Board uses a set evaluation process, explained in paragraph (b) of this section, to determine whether a claimant is disabled for any regular employment. This evaluation process applies to employees, widow(er)s, and children who have applied for annuities under the Railroad Retirement

Act based on disability for any regular employment. Regular employment means substantial gainful activity as that term is defined in § 220.141.

(b) *Steps in evaluating disability* * * *

* * * * *

(5) *Impairment(s) must prevent any other work.* (i) If the claimant is unable to do his or her past relevant work because of his or her impairment or combination of impairments, the Board will review the claimant's residual functional capacity and his or her age, education and work experience to determine if the claimant is able to do any other work. If the claimant cannot do other work, the Board will find him or her disabled. If the claimant can do other work, the Board will find the claimant not disabled.

* * * * *

3. 20 C.F.R. 220.132 provides in relevant part:

Physical exertion requirements.

* * * * *

(a) *Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and the other sedentary criteria are met.

STATEMENT

Petitioner worked for the Burlington Northern Railroad from July 1970 to January 1986. Pet. App. a2 n.1. He claims that he injured his back on December 30, 1985, when he was hit by a boxcar door, which caused him to hit a steel post. *Id.* at a1-a2 & n.1. He has not returned to his railroad job. *Id.* at b6-b7. Since petitioner left the railroad, his back injury consistently has given him some measure of pain. *Id.* at b5-b6. On January 25, 1990, petitioner applied for a disability annuity under the Railroad Retirement Act of 1974 (the Act), 45 U.S.C. 231 *et seq.*, which provides for a disability annuity for those former railroad employees "whose permanent physical or mental condition is such that they are unable to engage in any regular employment." 45 U.S.C. 231a(a)(1)(v). Petitioner's application was denied initially and upon reconsideration. Pet. App. b2.

Petitioner sought administrative review of the denial of benefits. The Hearings Officer reviewed the evidence in the record at considerable length, discussing the testimony of petitioner and each of the examining physicians as to the nature and extent of the pain experienced by petitioner. See Pet. App. b5-b13. After reviewing the evidence, the Hearings Officer found that petitioner "does have low back and shoulder pain," but that his claim that this pain restricted him from performing any work whatsoever was not credible. *Id.* at b12. Based on this credibility determination, the Hearings Officer found that while petitioner was not capable of returning to his former work at the railroad, he was capable of performing the full range of sedentary work. *Ibid.* Therefore, applying the medical-vocational guidelines contained in the Board's regulations, 20 C.F.R. Pt. 220, App. 2, the Hearings Officer found petitioner not

disabled. Pet. App. b13-b14. The Railroad Retirement Board affirmed and adopted the decision of the Hearings Officer. *Id.* at b1.

In an unpublished opinion, the court of appeals affirmed the decision of the Board. After reviewing the evidence in the record, the court determined that there is substantial evidence to support the Board's finding that petitioner's pain did not preclude him from doing sedentary work. Pet. App. a7-a8. Specifically, the court found that the "medical reports before the Hearings Officer permitted the inference that [petitioner] was overstating his pain problem." *Id.* at a6. The court also found that the Hearings Officer had taken petitioner's testimony concerning his pain into account in determining that petitioner's pain was "not a significant non-exertional impairment." *Id.* at a8. Because substantial evidence supported the Hearings Officer's finding of no significant non-exertional impairment, the court concluded that the Hearings Officer had not erred in applying the Board's medical-vocational guidelines (the "grids"). *Id.* at a7. Based on that conclusion, the court affirmed the decision of the Board denying petitioner a disability annuity. *Id.* at a8.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. Petitioner contends that the court of appeals erred in finding that there is substantial evidence to support the Board's denial of his application for a disability annuity under the Railroad Retirement Act. Questions of substantial evidence do not warrant review in this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S.

474, 490-491 (1951). In any event, petitioner's contention is without merit.

Although formulated in a variety of guises, petitioner's submission reduces to the assertion that the Hearings Officer erroneously found that petitioner was capable of performing the full range of sedentary work. See Pet. 6-8, 9-11, 13-21. The Hearings Officer fully considered petitioner's testimony concerning the limitations his pain imposed on him. See Pet. App. b5-b7. After reviewing the testimony of his treating physicians, however, the Hearings Officer concluded that petitioner's testimony simply was not credible. *Id.* at b12. The Hearings Officer found that, although petitioner certainly experienced pain, the testimony of the physicians contradicted his claim that he was incapable of doing any work whatsoever:

> Prior to the appellant's surgery in December 1988, the treating physician and surgeon, P.L. Raby, M.D., stated repeatedly that the appellant had no neurological deficits of the lower extremities, that straight leg raising tests were normal as were his reflexes. The physician concluded that the appellant be oriented toward a lighter type of work. * * * The new treating physician (W.S. Piechal, D.O.) found the appellant to have no neurological deficits, stating that deep tendon reflexes were normal, straight leg raising tests negative, no evidence or [*sic*] atrophy, wasting, or fasiculations and reported that the appellant has exhibited a normal gait. He concluded in August 1991, that the appellant could frequently lift ten pounds, stand and walk for two to three hours and sit four to five hours in an eight hour workday consistent with sedentary work.

Id. at b12-b13. Based on this testimony of the treating physicians, the Hearings Officer concluded that the extent of the pain was not so great as to deprive petitioner of "the residual functional capacity to perform the full range of sedentary work." Pet. App. b13.

The court of appeals found that the medical reports supported the Hearings Officer's credibility determination that petitioner remained capable of performing sedentary work. Pet. App. a6. Having concluded that the Hearings Officer's finding of no non-exertional limitation was supported by substantial evidence, the court of appeals properly concluded that the application of the Board's medical-vocational guidelines to petitioner's claim was appropriate. Compare *Heckler* v. *Campbell*, 461 U.S. 458 (1983) (upholding use of medical-vocational guidelines under the Social Security Act). A non-exertional impairment precludes use of the medical-vocational guidelines only where such an impairment affects the claimant's ability to perform the range of work encompassed by the particular provision of the grids. *Channel* v. *Heckler*, 747 F.2d 577, 582 n.6 (10th Cir. 1984). In this case, the Hearings Officer properly determined that petitioner's non-exertional limitation did not preclude him from doing the full range of sedentary work.

2. Petitioner's contention (Pet. 22-23) that the court of appeals applied the wrong standard in reviewing the Board's decision is equally meritless. The statutory standard applied by this Court in *INS* v. *Elias-Zacarias*, 112 S. Ct. 812, 815 (1992), cited by the court of appeals (Pet. App. a8 n.5), is essentially indistinguishable from the standard provided by the Railroad Retirement Act. Compare 8 U.S.C. 1105a(a)(4) (the Board of Immigration Appeals' "findings of fact, if supported by reasonable, substantial, and probative evidence on the record consid-

ered as a whole, shall be conclusive"), with 45 U.S.C. 355(f) (1988 & Supp. IV 1992) ("The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive.").

In *Elias-Zacarias*, the Court held that the agency's determination under such a standard may be reversed only if "a reasonable factfinder would have to conclude," on the basis of the evidence in the record, that a decision should be rendered for the challenging party, 112 S. Ct. at 815—*i.e.*, only if "the evidence * * * was so compelling that no reasonable factfinder could fail to find" in favor of that party, *id.* at 817. The court of appeals adhered to that standard. It concluded that "the record permits, and therefore supports," the Hearings Officer's finding that petitioner had the residual functional capacity to perform the full range of sedentary work. Correspondingly, the court concluded that the record "did not *compel*" a finding in favor of petitioner. Pet. App. a8 & n.5. Petitioner's objection to the court of appeals' articulation of the nature of its review accordingly does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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